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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND JAMES DILLON, Defendant and Appellant.	C060382 (Super. Ct. No. 06F11065)

A jury convicted defendant Raymond James Dillon of two counts of first degree robbery (Pen. Code, §§ 211, 212.5, subd. (a); further statutory references are to the Penal Code; counts one & five), two counts of first degree burglary (§§ 459, 460, subd. (a); counts two & seven), false imprisonment (§ 236; count three), battery causing serious bodily injury (§ 243, subd. (d); count four), carjacking (§ 215, subd. (a); count six), abuse of an elder likely to produce great bodily harm (§ 368, subd. (b)(1); count eight), false imprisonment of an elder (§ 368,

subd. (f); count nine), assault with a deadly weapon (§ 245, subd. (a)(1); count ten), receiving stolen property (§ 496, subd. (a); count eleven), and sale or transfer of an access card without consent (§ 484e, subd. (a); count twelve). The jury found that defendant personally used a deadly or dangerous weapon (§ 12022, subd. (b)(1)), and personally inflicted great bodily injury on a person over 70 years old (§ 12022.7, subd. (c)), in the commission of counts five through eight. In a bifurcated proceeding, the jury found that defendant had suffered a February 1986 first degree burglary conviction and a February 1999 attempted carjacking conviction, each of which had been alleged as both a prior serious felony (§ 667, subd. (a)) and a strike (§§ 667, subds. (b)-(i), 1170.12). Defendant was sentenced to state prison for a determinate term of 38 years and a consecutive indeterminate term of 77 years to life. The sentence was computed as follows: on count one, 25 years to life plus 10 years for prior convictions; on count six, 27 years to life (§ 667, subd. (e)(2)(A)(i)) plus three years for weapon use, five years for great bodily injury, and 10 years for prior convictions; and on count twelve, 25 years to life plus 10 years for prior convictions. Sentence on the remaining counts and enhancements was stayed pursuant to section 654.

On appeal, defendant contends (1) his count six carjacking conviction must be reversed because the victim was not in or near her car at the time it was taken from her garage, and (2) the trial court erred by imposing serious felony enhancements

(§ 667, subd. (a)) on counts three, four, eleven, and twelve, which are not serious felonies; the Attorney General concedes this last point. We shall modify the judgment.

FACTS[1]

Prosecution Case-In-Chief

On August 31, 2006, at approximately 3:45 p.m., 82-year-old victim B.K. was watching television in her living room. She saw defendant walk by her window, then turn around and walk back towards her house. She next heard a loud bang from the back of the house. Thinking that her cat had knocked something over, she got up to investigate. As she did so, defendant entered the house and started to choke her. Then he hit her head repeatedly with a metal bar and demanded her "PIN" number. She told him that she did not have a PIN number.

B.K. next remembered lying on the floor in the front bedroom with her hands and feet bound. Defendant entered the room, kicked her in the ribs, and asked her how to open the garage door. She told him where the wall switch for the door opener was located.

Defendant removed from the hall closet B.K.'s purse that contained her car keys, checkbook, and credit cards. He also stole a chain from around her neck.

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[1] Our statement of facts is limited to the count six carjacking.

Thereafter B.K. looked down the hallway into the garage and noticed that her car was gone. Defendant later gave one of B.K.'s credit cards to Lisa Stanley in exchange for drugs. B.K. spent 10 days in the hospital, suffered a fractured wrist, multiple broken fingers, and lacerations as a result of defendant's attack.

Defense

Lisa Stanley testified that she knew the credit card was stolen when she received it from defendant. She admitted that, in a previous conversation with a defense investigator, she had denied knowing that the card was stolen.

Ronald Sykes, a neighbor of B.K., testified that he saw a man in the alley behind B.K.'s house on the day of the attack. Sykes thought that, in a group of six photographs, the person in position three most resembled the man he saw. Defendant was in position five or six.

B.K. described her assailant to a Sheriff's Department sketch artist. Unlike defendant, the person depicted in the composite sketch had no moustache.

DISCUSSION

I

Defendant contends his count six carjacking conviction must be reversed because B.K. was not in or near her car at the time that it was taken from her garage. He argues that the crime of carjacking was not intended to apply to situations in which a car is stolen from its owner's home. We are not persuaded.

"'Carjacking' is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence . . . against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." (§ 215, subd. (a).)

"The [carjacking] statute does not require that the victim be inside or touching the vehicle at the time of the taking." (*People v. Medina* (1995) 39 Cal.App.4th 643, 650.) "To hold so would ignore the more inclusive meaning found in the 'immediate presence' clause in the statute." (*Ibid.*) For example, a car owner inside a motel room or a store is within the immediate presence of his or her car parked outside. (*Id.* at pp. 651-652; *People v. Hoard* (2002) 103 Cal.App.4th 599, 608-609.)

Moreover, carjacking "is a direct offshoot of the crime of robbery." (*In re Travis W.* (2003) 107 Cal.App.4th 368, 374.) "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) Property is in the person's "immediate presence" for purposes of robbery if it is "'"so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it."' [Citations.] Thus, the Court of Appeal stated in *People v. Bauer* (1966) 241 Cal.App.2d 632, 642[], that immediate presence '"must mean at least an area within which the victim could

reasonably be expected to exercise some physical control over [her] property."' [Citation.] Under this definition, property may be found to be in the victim's immediate presence 'even though it is located in another room of the house, or in another building on [the] premises.' [Citations.]" (*People v. Hayes* (1990) 52 Cal.3d 577, 627.) Because the later carjacking statute uses language identical to the earlier robbery statute, and no contrary intent appears, we presume that the Legislature intended the phrase "immediate presence" to have the same meaning in both the robbery and carjacking statutes. (*People v. Lopez* (2003) 31 Cal.4th 1051, 1060.)

Thus, B.K.'s car was within her "immediate presence" as a matter of law because it was "located in another room of the house," specifically an attached garage, which was just down the hallway and within her eyesight. (*People v. Hayes, supra,* 52 Cal.3d at p. 627.) The case is analogous to *Hoard* and *Medina* in which car keys were taken from victims through force or fear while inside a building, and their cars parked outside were subsequently stolen. (*People v. Hoard, supra*, 103 Cal.App.4th at pp. 608-609; *People v. Medina, supra*, 39 Cal.App.4th at pp. 651-652.) In fact, the present case is more egregious than *Hoard* or *Medina.* A victim's expectation of control over her car is greater when it is located in her garage than when it is outdoors in a commercial parking lot. B.K.'s expectation of control was greater still, because defendant required her

assistance in opening the garage door and could not do it by himself.

Defendant's reliance on *People v. Coleman* (2007) 146 Cal.App.4th 1363 is misplaced. The issue in that case was whether the stolen vehicle was "in the possession of" the victim. (§ 215; *Coleman, supra*, at p. 1367.) In concluding that the victim did not have possession, and the carjacking statute did not apply, the court stated: "[T]he keys [the victim] relinquished were not her own, and there was no evidence that she had ever been or would be a driver of or passenger in the Silverado. These circumstances are simply too far removed from the type of conduct that section 215 was designed to address." (*Id.* at p. 1373.)

Here, in contrast, it was beyond dispute that B.K. had possession of the car in her garage. Moreover, the *Coleman* court acknowledged that "a carjacking may occur where neither the possessor nor the passenger is inside or adjacent to the vehicle." (*People v. Coleman, supra*, 146 Cal.App.4th at p. 1373.) Thus, *Coleman* does not require reversal of defendant's carjacking conviction.

In sum, the "immediate presence" element of the carjacking statute was satisfied. Defendant broke into B.K.'s home, beat her, tied her up, left her in a bedroom, and stole her car from the adjacent garage after kicking her in the ribs and demanding information on how to open the garage door. B.K.'s physical

control over her car was limited only by defendant's use of force. Defendant was properly convicted of carjacking.

II

Defendant contends, and the Attorney General concedes, the trial court erred when it imposed serious felony enhancements on counts three, four, eleven, and twelve. We accept the Attorney General's concession.

Section 667, subdivision (a)(1) provides in relevant part that "any person convicted of a serious felony who previously has been convicted of a serious felony . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively." "As used in this subdivision, 'serious felony' means a serious felony listed in subdivision (c) of Section 1192.7." (§ 667, subd. (a)(4).) "Under section 667(a) . . . the current felony offense must be 'serious' within the meaning of section 1192.7, subdivision (c), for the five-year enhancement to apply. [Citation.]" (*People v. Dotson* (1997) 16 Cal.4th 547, 555.)

Defendant suffered two prior serious felony convictions and was subject to two five-year enhancements upon every prison term imposed for a current serious felony. But counts three (false imprisonment), four (battery resulting in serious bodily injury), eleven (receiving stolen property), and twelve (transferring an access card) are not serious felonies.

(§ 1192.7, subd. (c).) Thus, the two five-year enhancements imposed on each of those counts were improper. We shall modify the judgment by striking those enhancements.

DISPOSITION

The judgment is modified by striking the serious felony enhancements on counts three, four, eleven, and twelve. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

BLEASE, Acting P. J.

We concur:

SIMS, J.

BUTZ, J.